Abdul Hamid bin Udin v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–24 OF 1999
ABDUL WAHAB J
7 MARCH 2000

Criminal Procedure *— Charge — Wrong charge — Error in stating section number in charge — Whether accused misled by defence — Whether irregularity or error could be rectified — Criminal Procedure Code s 422*

Criminal Procedure *— Trial — Trial by two judges — Prosecution and defence case heard before different judges — Whether necessary for judge to re-summon witnesses and recommence trial — Whether accused materially prejudiced — Criminal Procedure Code s 261*

The appellant was charged under s 12(2) of the Dangerous Drugs Act 1952 ('the Act') for possession of 107.3g of cannabis punishable under s 39A(2) of the Act. At the time of arrest, the appellant was watching television with his brother and a neighbour. Upon being asked by SP4 whether he kept any prohibited item, the appellant took SP4 to his bedroom and showed SP4 a mattress, a pillow on that mattress and pointed to underneath the pillow. Upon lifting the pillow, SP4 found an orange plastic bag containing cannabis. SP6, the father of the appellant, said the room was the room of the appellant, and although others come to that room, it was only to relax. He said in cross-examination that it was the appellant's room, the mattress was the appellant's mattress, the clothes in the room were the appellant's clothes, the things in the room were the appellant's things and that the appellant had no other premises, the room was specially for him and he was always the occupier of the room. The appellant was found guilty as charged and was sentenced to six years' imprisonment and 10 strokes of the rotan. The appellant appealed. The appellant raised the following preliminary objections: (i) on the basis of s 261 of the Criminal Procedure Code ('the Code'), the appellant was materially prejudiced because the prosecution case and the defence case was heard before different judges; and (ii) the preceding judge is still a judge of the sessions court. The issues raised by the defence were, inter alia, non-exclusive custody and control of the premises; and failure of the prosecution to call certain witnesses.

Held, dismissing the appeal:

(1) A perusal of the record of the prosecution case does not show anything obvious or manifest upon it that makes it necessary for the succeeding judge to exercise the discretion on his own to re-summon the witnesses and recommence the trial. Although the succeeding judge did not give written reasons, it is clear from a reading of the record that the judge was not manifestly wrong to

A be satisfied with the testimony on the record. Indeed he was supported in that conclusion in that no demand was made by the appellant for any of the witnesses to be recalled and reheard when the succeeding judge commenced his proceedings (see p 343D–E).

B (2) The moment a judge is transferred out of a court, he ceases to exercise jurisdiction in all of the cases in court he is transferred from and assumes jurisdiction in the court he is transferred to. That he remains a judge, and contrary to fiction, has nothing to do with the issue since cases are not assigned to judges personally, but to the courts (see pp 343I–344A).

C (3) Although it is true that the succeeding judge would have to consider all of the evidence at the end of the case, it cannot be said the accused was ipso facto materially prejudiced, particularly where the accused, represented by counsel, had not in any case demanded the witnesses or any of them be re-summoned and re-

D heard. In the absence of such objection, the argument that the fact that the succeeding judge did not see the demeanour of the witnesses was a fatal flaw, lacked merit and from a detailed review of the record of appeal, the court found the argument unsustainable on the facts (see pp 344H–345A).

(4) Since a decision calling for the defence is not an order that

E brings the trial to a close and there being no other provision that the trial judge must prepare grounds of decision at that stage, the preceding trial judge was under no obligation to set out his grounds of decision when calling for the defence (see p 345F).

F (5) In this case, the defence had been called. Section 261 of the Code does not provide for the recall of witnesses after the defence had been called since there can be no question of the succeeding judge changing that decision. The succeeding judge can only proceed with hearing the defence and render a decision upon a review of the written record of evidence from the preceding

G judge, and it is for the appellate court later to consider the issue whether the accused has been materially prejudiced (see p 345H–346A).

(6) No material prejudice can arise from the simple fact of the absence of the grounds of decision for calling of the defence since

H in any case the succeeding judge has to make a decision upon the whole of the evidence, and since he had heard only the defence witnesses, there was a natural advantage in favour of the defence (see p 346A–B).

(7) Reference to the Act shows that s 12(2) applies only to such

I dangerous drugs as listed in Parts III, IV and V of the First Schedule. As to cannabis, only its extract or tincture is listed in Part III. Cannabis and cannabis resin are not extracts or tinctures of cannabis and are separately listed under Part II. The offence of

the possession of 'cannabis' in this case cannot be under s 12(2). In fact it should be under s 6. Very clearly, the appellant was wrongly charged under s 12(2) (see p 346C–D). A

(8) Section 152(iv) of the Code requires that the law and the section against which the offence is said to have been committed shall be stated in the charge. On the face of it, the charge complies with s 152(iv) since the law and the section was stated. While there was an error in stating the section number, there was no doubt whatsoever that the appellant was charged for the offence of possession of cannabis under the Act. Illegality connotes the failure to comply with the law. What appeared to have occurred in this case was that there was compliance, but that there was an error (see pp 346H–347A). B C

(9) Although s 12 deals with various drugs including extract or tincture of cannabis but not cannabis and cannabis resin, the other elements of the offence of possession under s 12 are similar or identical to s 6 for cannabis. The appellant could not be said to have been misled in his defence. Furthermore, the fact that the issue was not raised on appeal made it clear that the appellant did not consider there was a failure of justice. Therefore the court ruled that in the specific circumstances, s 422 of the Code may be applied to rectify the irregularity or error since no failure of justice had been occasioned (see p 347C–E). D E

(10) The appellant's response to SP4's question showed that he admitted to being the person keeping the prohibited item. He acknowledged that the thing in the orange plastic bag was a prohibited item. He showed SP4 where it was. Therefore he knew what it was. In other words, he had custody, control and knowledge of the cannabis in the orange bag. He therefore had the requisite guilty knowledge (see p 349H–I); *PP v Khoo Boo Hock & Anor* [1988] 2 MLJ 217 distinguished. F

(11) There should be at least one witness on every element of the prosecution case. The evidence of the main witness, SP4, was not shaken in cross-examination, and witnesses had testified and given evidence on each and every element of the charge. The need to call additional witnesses to support his testimony therefore did not arise. The magistrate was therefore correct in holding that the prosecution had succeeded in proving a prima facie case against the appellant and to call upon the appellant to enter on his defence (see pp 350H–351A). G H

(12) The grounds of appeal relate to findings of fact. The general rule is that an appellate court will not interfere with findings of fact. In the present case, the direct facts were simple in nature and led to the irresistible conclusion that the appellant had possession of the drugs. There was nothing in the testimony of SP4 and SP6 to I

show that they could not be believed and accepted. The prosecution had proved its case beyond reasonable doubt that the appellant had possession of the cannabis (see pp 352F–353A, 353H, 354B).

[Bahasa Malaysia summary

Perayu dipertuduhkan di bawah s 12(2) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana memiliki 107.3g ganja yang boleh dihukum di bawah s 39A(2) Akta tersebut. Pada masa tangkapannya, perayu sedang menonton televisyen bersama abangnya dan seorang jiran. Apabila ditanya oleh SP4 jikalau beliau menyimpan apa-apa benda yang dilarang, perayu telah membawa SP4 ke bilik tidurnya dan menunjukkan tilam, bantal atas tilam tersebut kepada SP4 dan menuding jarinya ke bawah bantal tersebut. Apabila bantal tersebut diangkat, SP4 menjumpai suatu beg plastik berwarna jingga yang mengandungi ganja. SP6, ayah perayu, mengatakan bilik tersebut adalah bilik perayu, dan walaupun orang lain menggunakannya, ia hanyalah untuk beristirehat. Beliau berkata dalam pemeriksaan balas bahawa bilik tersebut adalah bilik perayu, tilam tersebut adalah tilam perayu, pakaian dalam bilik tersebut adalah pakaian perayu, benda dalam bilik tersebut adalah kepunyaan perayu dan bahawa perayu tidak mempunyai premis lain, bilik tersebut khas untuknya dan beliau senantiasa merupakan penghuni bilik tersebut. Perayu telah didapati bersalah seperti didakwa dan dijatuhkan hukuman penjara selama enam tahun dan sepuluh sebatan rotan. Perayu membuat rayuan. Perayu membangkitkan bantahan permulaan berikut: (i) berdasarkan s 261 Kanun Acara Jenayah ('Kanun tersebut'), oleh kerana kes pendakwa dan kes pembela telah dibicarakan di hadapan hakim berlainan, ini memudaratkan perayu dari segi material; dan (ii) hakim yang bersidang dahulu masih berkhidmat sebagai hakim mahkamah sesyen. Isu-isu yang dibangkitkan oleh pihak pembelaan adalah, antara lain, jagaan dan kawalan secara tidak eksklusif ke atas premis tersebut; dan kegagalan pihak pendakwa untuk memanggil saksi-saksi tertentu.

Diputuskan, menolak rayuan tersebut:

(1) Suatu penelitian rekod kes pendakwaan tidak menunjukkan apa-apa yang jelas atau ternyata padanya yang memerlukan hakim pengganti sendiri melaksanakan budi bicara untuk memanggil saksi-saksi semula dan memulakan perbicaraan sekali lagi. Walaupun hakim pengganti tidak memberi alasan bertulis, adalah nyata daripada satu bacaan rekod bahawa hakim tersebut tidak salah secara terang-terang kerana berpuas hati dengan keterangan pada rekod. Beliau sesungguhnya disokong dalam kesimpulan ini dalam ertikata tiada tuntutan telah dibuat oleh perayu untuk mana-mana saksi dipanggil semula dan didengar semula apabila hakim pengganti memulakan prosiding (lihat ms 343D–E).

(2) Pada saat seorang hakim dipindah dari sebuah mahkamah, beliau tidak lagi melaksanakan bidang kuasa dalam segala kes di mahkamah dari mana beliau dipindah dan mengambil alih bidang kuasa mahkamah di mana beliau dipindahkan. Hakikat beliau kekal sebagai seorang hakim, dan bertentangan dengan apa yang dipercayai, tidak mempunyai apa-apa kaitan dengan isu memandangkan kes-kes tidak ditugaskan kepada hakim sendiri, tetapi kepada mahkamah (lihat ms 343I–344A).

(3) Walaupun adalah benar bahawa hakim pengganti seharusnya menimbang segala keterangan di penutup kes, ia tidak boleh dikatakan bahawa tertuduh ipso facto dimudaratkan dari segi material, terutamanya di mana tertuduh, yang diwakili oleh peguam, tidak pun menuntut supaya saksi tersebut atau sesiapa daripada mereka dipanggil semula dan didengar semula. Dalam ketiadaan bantahan sedemikian, hujah bahawa hakikat hakim pengganti tidak nampak tingkah laku saksi-saksi tersebut adalah suatu kekurangan yang padah, adalah tidak bermerit dan daripada suatu kajian semula terperinci rekod rayuan, mahkamah mendapati hujah ini tidak boleh disokong atas faktanya (lihat ms 344H–345A).

(4) Oleh kerana suatu keputusan yang memanggil untuk pembelaan bukanlah perintah yang membawa perbicaraan kepada penutupnya dan memandangkan tiada peruntukan lain bahawa hakim perbicaraan mesti menyediakan alasan keputusan di peringkat tersebut, hakim perbicaraan terdahulu tidak wajib menyatakan alasan keputusan beliau ketika memanggil pembelaan (lihat ms 345F).

(5) Dalam kes ini, pembelaan telah dipanggil. Seksyen 261 Kanun tersebut tidak memperuntukkan pemanggilan semula saksi selepas pembelaan telah dipanggil kerana tiada kemungkinan hakim pengganti boleh menukar keputusan tersebut. Hakim pengganti cuma boleh terus mendengar pembelaan dan membuat keputusan setelah mengkaji semula rekod keterangan bertulis daripada hakim terdahulu, dan ia merupakan tugas mahkamah rayuan kemudiannya untuk menimbang isu sama ada tertuduh telah dimudaratkan secara material (lihat ms 345H–346A).

(6) Tiada kemudaratan material boleh berbangkit daripada hakikat tiadanya alasan keputusan untuk memanggil pembelaan memandangkan dalam apa-apa kes hakim pengganti harus membuat keputusan berlandaskan keseluruhan keterangan, dan oleh kerana beliau cuma telah mendengar saksi-saksi pembelaan, wujudnya kelebihan yang berpihak kepada pihak pembelaan (lihat ms 346A–B).

(7) Rujukan kepada Akta tersebut menunjukkan bahawa s 12(2) hanya terpakai kepada dadah berbahaya seperti yang disenaraikan dalam Bahagian-Bahagian III, IV dan V Jadual Pertama. Berhubung dengan ganja, hanya ekstrak atau larutannya

A disenaraikan dalam Bahagian III. Ganja dan resin ganja bukanlah ekstrak atau larutan ganja dan disenaraikan secara berasingan di bawah Bahagian II. Kesalahan pemilikan 'ganja' dalam kes ini tidak mungkin di bawah s 12(2). Malahan ia haruslah terletak di bawah s 6. Adalah nyata perayu salah dipertuduhkan di bawah s 12(2) (lihat ms 346C–D).

B (8) Seksyen 152(iv) Kanun tersebut menetapkan bahawa undang-undang dan seksyen terhadap mana kesalahan tersebut dikatakan dilakukan hendaklah dinyatakan dalam tuduhan. Pada zahirnya, tuduhan tersebut mematuhi s 152(iv) oleh kerana seksyen dan undang-undang telah pun dinyatakan. Sedangkan C terdapat kesilapan dalam menyatakan nombor seksyen, tiada keraguan sama sekali bahawa perayu dipertuduhkan untuk kesalahan pemilikan ganja di bawah Akta tersebut. Kepenyalahan menandakan kegagalan untuk mematuhi undang-undang. Apa yang kelihatan berlaku dalam kes ini adalah bahawa adanya kepatuhan, tetapi kesilapan telah berlaku D (lihat ms 346H–347A).

(9) Walaupun s 12 adalah berkenaan dengan pelbagai dadah termasuk ekstrak atau larutan ganja tetapi bukan ganja dan resin ganja, unsur-unsur lain kesalahan pemilikan di bawah s 12 hampir sama atau serupa dengan s 6 untuk ganja. Perayu tidak boleh E dikatakan telah diperdayai dalam pembelaannya. Tambahan pula, hakikat bahawa isu ini tidak dibangkitkan pada tahap rayuan mengesahkan bahawa perayu tidak rasa kegagalan keadilan telah berlaku. Maka mahkamah memutuskan bahawa dalam keadaan khusus ini, s 422 Kanun tersebut boleh dipakai untuk membetulkan luar aturan atau kesilapan oleh kerana tiada F kegagalan keadilan telah berlaku (lihat ms 347C–E).

(10) Jawapan perayu kepada soalan SP4 menunjukkan bahawa ia mengaku dirinya sebagai orang yang menyimpan benda yang dilarang. Beliau mengaku bahawa benda dalam beg plastik jingga tersebut adalah benda yang dilarang. Ia telah menunjukkan G di manakah benda itu kepada SP4. Oleh itu, beliau tahu apakah benda itu. Dalam kata lain, ia mempunyai jagaan, kawalan dan maklumat mengenai ganja dalam beg jingga tersebut. Justeru itu, ia mempunyai pengetahuan salah yang dikehendaki (lihat ms 349H–I); *PP v Khoo Boo Hock & Anor* [1988] 2 MLJ 217 dibeza. H

(11) Mestilah terdapat sekurang-kurangnya seorang saksi untuk setiap unsur kes pendakwa. Keterangan saksi utama iaitu SP4 tidak terancam dalam pemeriksaan balas, dan saksi-saksi telah memberi keterangan atas setiap satu unsur tuduhan itu. Dengan itu, keperluan untuk memanggil saksi tambahan bagi menyokong I keterangannya tidak timbul. Oleh itu majistret adalah betul dalam memutuskan bahawa pihak pendakwa telah berjaya membuktikan suatu kes prima facie terhadap perayu dan

memanggil perayu untuk memasukkan pembelaannya (lihat ms 350H–351A). A

(12) Alasan rayuan berkaitan dengan keputusan fakta. Rukun am adalah bahawa sesebuah mahkamah rayuan tidak akan mengganggu keputusan fakta. Dalam kes ini, fakta langsung mudah difaham dan membawa kepada kesimpulan yang tidak boleh dielakkan bahawa perayu memiliki dadah tersebut. Tiada apa dalam keterangan SP4 dan SP6 untuk menunjukkan bahawa mereka tidak boleh dipercayai dan diterima. Pihak pendakwa telah membuktikan kesnya melampaui keraguan munasabah bahawa perayu memiliki ganja tersebut (lihat ms 352F–353A, 353H, 354B).] B C

Notes

For cases on wrong charge, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1016–1022.

For cases on trial by two judges, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3603–3604. D

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd) E
Ahmad bin Hashim v PP [1950] MLJ 1 (refd)
Bong Kim Son v PP [1998] 1 MLJ 645 (refd)
Cheong Sik Kwan v PP [1959] MLJ 189 (refd)
Chong Kwee Hian v PP [1948–49] MLJ Supp 191 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Dato' Seri Anwar Ibrahim v PP [1999] 1 MLJ 321 (refd) F
Marzuki bin Mokhtar v PP [1981] 2 MLJ 155 (refd)
Mohamed Idris bin Haji Mohamed Said v R [1949] MLJ 31 (refd)
Mohd Shariff v PP [1964] MLJ 64 (refd)
Oh Keng Seng v PP [1976] 1 MLJ 143 (refd)
Papathy v PP [1956] MLJ 18 (refd)
PP v Goh Chooi Guan [1978] 2 MLJ 169 (refd) G
PP v Khoo Boo Hock & Anor [1988] 2 MLJ 217 (distd)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
PP v Ma'arif [1969] 2 MLJ 65 (refd)
PP v Mohd Jon [1993] 1 MLJ 133 (refd)
Rasiah Munusamy, Re [1983] 2 MLJ 294 (refd) H
Shamsuddin Mohd Tahir v PP [1998] 3 CLJ Supp 170 (refd)
Teay Wah Cheong v PP [1964] MLJ 21 (refd)
Yee Ya Meng v PP [1972] 1 MLJ 120 (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183 (refd)

I

Legislation referred to

Courts of Judicature Act 1964 s 50(1)

A Criminal Procedure Code ss 133, 152(iv), 261, s 261 proviso (b), 271, 307(i), 422
Dangerous Drugs Act 1952 ss 6, 11(1), 12(2), 37A, 39A(2), 422, Part IV
Evidence Act 1950 s 114(g)

B **Appeal from:** Arrest Case No 62–134 of 1997 (Sessions Court, Kuala Lumpur)

Bhagwan Singh (*Bhagwan Singh & Ridzuan*) for the appellant.
Noor Ruweena Dato' Hj Mohd Noordin (Deputy Public Prosecutor) for the respondent.

C **Abdul Wahab J**: The appellant, Abdul Hamid bin Udin was charged and convicted upon a charge:

> Bahawa kamu pada 25 Mei 1997, jam lebih kurang pukul 10.45 malam, dalam bulk sebuah rumah tidak bernombor berhampiran Lot 91, Perumahan MARA, Pantai Dalam, Brickfields dalam Bandaraya Kuala Lumpur dalam
> D Wilayah Persekutuan sebagai orang yang tidak diberi kuasa di bawah s 6(2) atau 8(1) Akta Dadah Berbahaya 1952 telah didapati memiliki satu beg plastik warna oren yang mengandungi cannabis yang beratnya berjumlah 107.3 gram, oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah s 12(2) dan boleh dihukum di bawah s 39A(2) Akta Dadah Berbahaya 1952.

E Section 39A(2) of the Dangerous Drugs Act 1952 ('the Act') provides that every person found guilty under the Act where the offence is not punishable with death, and the subject matter of the offence is 50g or more in weight of cannabis (f), cannabis resin (g), or cannabis and cannabis resin (h), shall instead of being liable to the punishment for that offence under the section
F under which the person has so been found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes. Punishment can only be meted out under this section, therefore, only if he could first properly be convicted under a section of the Act.

He was sentenced to six years' imprisonment and ten strokes of the
G rotan, and although he has given notice of appeal against both conviction and sentence, the petition of appeal confined itself only to grounds in relation to conviction.

At the outset of the hearing of the appeal, it was argued for the appellant, on the basis of s 261 of the Criminal Procedure Code ('the
H Code'), that the appellant was materially prejudiced because the prosecution case was heard before Puan Suraya Bt Othman, and the defence case was heard before another judge, Tn Abd Karim bin Jalil.

It is always very highly desirable that judgment in any case should be given by the judge who has heard and recorded all the evidence himself and has heard and seen the witnesses (see *Chong Kwee Hian v PP* [1948–49]
I MLJ Supp 191). Would that it be that all that is desirable will come to pass. However, judges may move on or be transferred, and no longer exercise jurisdiction in a case. Provision in the event of changes of trial magistrates

and judges in the sessions and magistrates' courts (see *PP v Mohd Jon* [1993] 1 MLJ 133) is therefore made in s 261 of the Code:

> Change of Magistrate during hearing
> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had ..., if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

Nevertheless the fact remains that a trial judge taking over a trial from another judge would be very much at a disadvantage when he does not have the means of assessing the demeanour of the witnesses so far called (see *PP v Mohd Jon*). It is self-evident that the disadvantage exists only where the demeanour of witnesses is important in the assessment of the evidence of the particular witness. It is not so important in the case of more or less formal witnesses (see *Mohamed Idris bin Haji Mohamed Said v R* [1949] MLJ 31). In other words, demeanour is not always a determining factor in the assessment of the testimony of a witness. In *Mohamed Idris bin Haji Mohamed Said v R* it was also recognized there may be cases where the succeeding judge has no option but to rely on the recorded testimony if the witness cannot be found. The extent to which the succeeding judge can rely upon the recorded testimony and the weight to give to it must depend upon the nature of the recorded testimony, and the challenge it is subjected to. If the personal credibility of the witness is challenged, his demeanour would be material. An incoming judge would not necessarily be aware if demeanour of any particular witness is important by a reading of the record, unless a note of the demeanour is recorded in accordance with s 271 of the Code which provides:

> Remarks as to demeanour of witness
>
> A presiding Magistrate recording the evidence of a witness may, at the conclusion of such evidence and at the foot of the notes thereof, record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Where a judge recording the evidence had not found it necessary to record the demeanour of a witness as so provided, then it is fair and reasonable to conclude that the trial judge did not view that demeanour in court of that witness is a very important factor in assessing his credibility. In such a case,

A the recorded evidence is an adequate presentation of his evidence. Of course a trial judge may consider demeanour in his decision even though he had not seen it necessary to record his impressions of the demeanour under s 271, such demeanour cannot be as influential as demeanour he has seen fit to record.

B If the accused is anxious that demeanour should be considered, proviso (a) of the section provides that he may in such cases demand that any of the witnesses be re-summoned and re-heard. Such demand would make demeanour into an issue to be considered. Otherwise, consideration of the sworn testimony without reference to demeanour is not by itself a fatal flaw. It must first have been put in issue.

C Where no such demand is made, the judge makes his own assessment, as provided by s 261 from the record as to whether to:

(a) act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or

D (b) he may re-summon the witnesses and recommence the inquiry or trial.

A perusal of the record of the prosecution case does not show anything obvious or manifest upon it that makes it necessary for the succeeding judge to exercise the discretion on his own to re-summon the witnesses and recommence the trial. Although the succeeding judge did not give written E reasons, it is clear from a reading of the record that the judge was not manifestly wrong to be satisfied with the testimony on the record. Indeed he was supported in that conclusion in that no demand was made by the appellant for any of the witnesses to be recalled and reheard when the succeeding judge commenced his proceedings.

F Another issue raised for the appellant is that the preceding judge is still a judge of the sessions court. In this regard reference was made to *PP v Kulasingam* [1974] 2 MLJ 26, *Oh Keng Seng v PP* [1976] 1 MLJ 143, *PP v Goh Chooi Guan* [1978] 2 MLJ 169. Those cases involved judicial officers who were transferred to the prosecution or other legal office, and there were differing decisions. To my mind, while transfers of judicial officers in the G midst of an ongoing trial is undesirable, the alternative of not transferring is at least equally undesirable. This alternative in practice occurs because large numbers of trial cases are part heard and adjourned for various reasons, and it is difficult to find an instance of an officer who does not have part heard cases unless he had just been transferred into that office. The cost and disturbance to hearings of cases if officers have to return to their earlier H posts to finish hearing of part heard cases would be even more undesirable. Accepting therefore the fact transfers are a necessary evil, we must return to the application of s 261 as it is intended. In this I note specifically the use of the words '*after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein*'. The legislature clearly intended the section to apply even in a case where the whole of the evidence has been I heard by the preceding judge. More importantly are the words '*ceases to exercise jurisdiction therein*'. The moment a judge is transferred out of a court, he ceases to exercise jurisdiction in all of the cases in court he is transferred

from and assumes jurisdiction in the court he is transferred to. That he remains a judge, and contrary to fiction, has nothing to do with the issue since cases are not assigned to judges personally, but to the courts.

Proviso (b) to s 261 provides that whether there is an appeal or not, the High Court may set aside a conviction if it is of the opinion that the accused has been materially prejudiced thereby. This proviso is unnecessary if the intention is that a decision not to re-summon witnesses and re-commence the trial since the appeal provisions would be adequate. It is clear that by enacting proviso (b), the legislature did not intend the decision not to re-summon witnesses and re-commence the trial or to refuse a demand under proviso (b) to be by themselves a ground of appeal unless the High Court finds that the accused has been materially prejudiced thereby.

The submission for the appellant on this issue did not condescend to the material prejudice. He simply submitted upon the power of the court to set aside the conviction, referring to *Chong Kwee Hian v PP* as to the discretion of the succeeding magistrate whether to recommence the trial or not, *Teay Wah Cheong v PP* [1964] MLJ 21 that it is much better for the succeeding magistrate to hear the case ab initio if it would not cause great hardship or inconvenience to the accused person and witnesses, and *PP v Mohd Jon*. In *Teay Wah Cheong v PP*, Hashim J, in a very brief judgment based upon other grounds, had added the following remarks with regard to s 261 of the Code:

> Finally, may I point out the danger of acting under s 261 of the Criminal Procedure Code. In this case a President of the Sessions Court recorded evidence of eight witnesses. He was then succeeded by the present President of the Sessions Court. The present President recorded further evidence and came to a finding. In his grounds of judgment the learned President stated there was in fact only one eye-witness to the accident, presumably the wife of Abdul Salam whose evidence was recorded by the present President. However the whole record shows there were two other eye-witnesses whose evidence was recorded by the former President. Unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case ab initio rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor vis-a-vis the credibility of the witness.

It is unfortunate the remarks were made on general principles only, and we do not have the benefit of a close consideration of s 261. The facts in *Teay Wah Cheong v PP* is in any case distinguishable from the instant case where the same judge had heard the entire prosecution case and had called for the defence. Although it is true that the succeeding judge would have to consider all of the evidence at the end of the case, it cannot be said the accused was ipso facto materially prejudiced, particularly where the accused, represented by counsel, had not in any case demanded the witnesses or any of them be re-summoned and re-heard. In the absence of such objection, the argument that the fact the succeeding trial judge did not

see the demeanour of the witnesses is a fatal flaw, lacks merit, and from a detailed review of the record of appeal and as set out below, I find the argument unsustainable on the facts.

The preceding judge in this case did not write a judgment setting out the reasons why she had called for the defence. Superficially it would appear that a succeeding judge would derive much assistance if the preceding judge had set out her reasons for calling for the defence, and prejudice may therefore arise. To consider this issue, it is necessary to consider the following.

In *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155, the appellant had appealed against a decision of the trial court that there was a case for the appellant to answer. It was held that a decision at the end of the prosecution case that there is a case to answer is not a judgment within the contemplation of s 307(i) of the Code, since a judgment must in the context mean a final order in a trial terminating in the conviction or acquittal of the accused, in other words an order that brought the proceedings to an end. Any of these decisions may appear to be final on the particular issue, but the finality contemplated by s 307 of the Code is finality of the trial as such, bringing it to a close. There is much to be said in favour of this conclusion since the alternative of allowing non-final orders to be appealed upon in the course of a trial would prevent delays in bringing the trial to early and orderly close, and appeals against various decisions made in the course of a trial could be considered in one and the same appeal since the appellate court has the power to consider the matter in the light of all the circumstances and decide whether or not to set aside the final trial decision and whether or not to order a retrial. More recent cases on s 50(1) of the Courts of Judicature Act 1964, such as *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321 (CA) took a similar approach.

It follows that because that a decision calling for the defence is not an order that brings the trial to a close, and there being no other provision that the trial judge must prepare grounds of decision at that stage, the preceding trial judge was under no obligation to set out his grounds of decision when calling for the defence.

Having concluded that there is no obligation under the Code on the preceding judge to prepare grounds of decision, the issue returns to the question whether the absence of such grounds necessarily results in material prejudice dealt with earlier above. Section 261 provides a discretion upon the succeeding judge to decide whether to continue or recommence the trial. In the event the accused is apprehensive he may be prejudiced by the fact the judge would not have the benefit of assessing the demeanour of particular witnesses, he has the right to demand such witnesses to be recalled and reheard. To that extent there is adequate provision to prevent material prejudice. In this case the defence had been called. Section 261 does not provide for the recall of witnesses after the defence has been called since there can be no question of the succeeding judge changing that decision. The succeeding judge can only proceed with hearing the defence, and render a decision upon a review of the written record of evidence from

the preceding judge, and it is for the appellate court later to consider the issue whether the accused has been materially prejudiced.

I would add that no material prejudice can arise from the simple fact of the absence of the grounds of decision for calling of the defence since in any case the succeeding judge has to make a decision upon the whole of the evidence, and since he has heard only the defence witnesses, there is a natural advantage in favour of the defence.

For these reasons I had rejected this preliminary submission, and directed that counsel proceed with the appeal by submitting upon the grounds of appeal as filed.

Wrong section

Reference to the Act shows that s 12(2), which is in Part IV of the Act, applies only to such dangerous drugs that according to s 11(1), as are listed in Parts III, IV and V of the First Schedule. As to cannabis, only its extract or tincture is listed in part III. Cannabis and cannabis resin are not extracts or tinctures of cannabis, and are separately listed under Part II. The offence of the possession of 'cannabis' in this case cannot be under s 12(2). In fact it should be under s 6.

Very clearly the appellant was wrongly charged under s 12(2). Even though the parties have not submitted upon it, the court must nevertheless consider whether this plain and obvious error is curable under s 422 of the Code which provides:

> Subject to the provisions contained in this Chapter no finding sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons. warrant, charge, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Code;
>
> (b) the want of any sanction; or the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want or improper admission or rejection of evidence has occasioned a failure of justice.

In *Bong Kim Son v PP* [1998] 1 MLJ 645, following *Re Rasiah Munusamy* [1983] 2 MLJ 294, and *Ahmad bin Hashim v PP* [1950] MLJ 1 (CA), *Papathy v PP* [1956] MLJ 18 (CA) and *Cheong Sik Kwan v PP* [1959] MLJ 189 (CA) it was held that s 422 cannot be applied to cure an illegality. In those cases, the illegality was non-compliance with s 133 of the Code, being the mandatory procedure with regard to commencement and cognizance of private prosecution. Section 152(iv) of the Code requires that the law and the section against which the offence is said to have been committed shall be stated in the charge. On the face of it the charge complies with s 152(iv) of the Code since the law and the section was stated. While there is an error in stating the section number, there is no doubt whatsoever that the appellant was charged for the offence of possession of cannabis under the Act. Illegality connotes the failure to comply with the

law. What appears to have occurred in this case is that there is compliance, but that there is an error.

The notes of proceedings show the following entry on 3 August 1998, at the end of the prosecution case and before commencement of submissions:

TPR: Pertuduhan pindaan kedua pinda seksyen kepada s 6(2) dan 8(1) dan kesalahan di bawah s 12.

En Bhagwan: Tiada bantahan kerana tiada prejudis.

PBTF

Masih minta bicara.

PB: Tidak perlu recall apa-apa dari saksi kerana pindaan ini.

There is no doubt at all times that the offence the appellant was accused of was possession of cannabis under the Act. Although s 12 deals with various drugs including extract or tincture of cannabis but not cannabis and cannabis resin, the other elements of the offence of possession under s 12 are similar or identical to s 6 for cannabis. The appellant cannot be said to have been misled in his defence. Furthermore from the record the appellant, who was represented by counsel, did not object, did not see the need to recall witnesses and said the appellant was not prejudiced. The fact the issue was not raised on appeal makes it clear that appellant did not consider there was a failure of justice. I would therefore rule, in these specific circumstances that s 422 of the Code may be applied to rectify the irregularity or error since no failure of justice has been occassioned.

The grounds of appeal as filed are as follows:

(1) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang kerana memutuskan ada kes prima facie terhadap perayu dan memanggil Tertuduh untuk membela dirinya.

(2) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila memutuskan bahawa Pendakwa mempunyai bukti yang cukup untuk mengarahkan perayu untuk membela diri.

(3) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila beliau gagal untuk mengambil kira bahawa bilik di mana perayu dijumpai pada masa tangkapan dibuat bukan sahaja didiami oleh Perayu, tetapi bilik tersebut juga digunakan oleh anggota-anggota keluarga Perayu.

(4) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila gagal untuk menimbangkan fakta bahawa Perayu tidak mempunyai 'exclusive custody and control' ke atas dadah yang dijumpai di dalam bilik tersebut. Dadah tersebut tidak disembunyikan (concealed).

(5) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila gagal untuk mempertimbangkan fakta bahawa terdapat dua orang lagi dalam bilik tersebut iaitu abang dan jiran perayu pada masa tangkapan dan mereka mempunyai 'access' kepada tempat di mana dadah tersebut dijumpai.

(6) Yang Arif telah tersilap di segi fakta dan undang-undang apabila gagal untuk mempertimbangkan dengan sewajarnya keterangan dan dua orang yang berada ditempat kejadian pada masa tangkapan yang mempunyai

akses kepada bilik perayu iaitu saksi Pendakwa No 3, Ahmad bin Zainal dan saksi Pendakwa No 5, Ashari bin Udin.

(7) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila gagal untuk mempertimbangkan dengan sewajarnya keterangan dan saksi pendakwa No 6, Udin bin Tanda iaitu ayah kepada perayu dimana beliau telah memberi keterangan apabila bilik di mana dadah dijumpai bukan hanya digunakan oleh anggota keluarga yang lain.

(8) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila gagal untuk mempertimbangkan dengan sewajarnya keterangan yang diberi oleh perayu dan saksi sokongannya. Pihak Pembela telah berjaya untuk menjawab kes Pendakwa.

(9) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila gagal untuk mengambil kira fakta bahawa pihak pembelaan telah menimbulkan suatu keraguan yang munasabah ke atas kes pendakwaan dan Yang Arif Hakim telah gagal untuk memberikan faedah keraguan pada Perayu.

(10) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang apabila menyabitkan Perayu sungguhpun bertentangan dengan keterangan (weight of evidence) yang dikemukakan oleh Pendakwa.

(11) Yang Arif Hakim telah tersilap di segi fakta dan undang-undang kerana mendapati perayu bersalah dan disabitkan dengan kesalahan.

The issues raised in submissions may be dealt with under the headings as follows:

Evidence of two other slabs of cannabis

Evidence was introduced through SP4 of substantial quantities in the form of two slabs of cannabis found in the house near the stairs. The appellant was not charged with any offence in relation to the two slabs, but was charged for possession of 1073g of cannabis found under a pillow on a mattress in his room. On the face of it evidence as to the two slabs of cannabis is prejudicial and inadmissible, and the trial might have been prejudiced by such evidence. Having considered the issue further, I find that such evidence is not necessarily prejudicial to the appellant, since that evidence is not inconsistent with the suggestion put to the prosecution witnesses by the defence that other persons also have access to the premises.

Non-exclusive custody and control of the premises

At the time of arrest, the appellant's brother and a neighbour were in the premises watching television with the appellant. The brother and the neighbour said they knew nothing of any drug found on the premises. There is also the evidence of the appellant's father and brother that the bedroom is accessible to and is used by other members of the family from time to time. The father and the brother did not say they had anything to do with the drugs. Nevertheless, it is unsafe, on the basis only of the fact alone that he occupies the room, to conclude that the appellant must necessarily have possession of all of the things in the room. The rationale of *PP v Khoo Boo*

Hock & Anor [1988] 2 MLJ 217 is that when a person does not have exclusive custody and control of a room, it is unsafe to conclude he alone has possession of everything found in it. The drugs may be the possession of other persons who have access to the room. But that is not to say that a person who does not have exclusive custody or control of a room cannot be said to have possession of any of the things found in the room, since other evidence may link the things found to that person. To show that a particular person has possession of a particular thing, something more than knowledge or his access to the premises must be shown that links the thing to him. Thus in *Choo Yoke Choy v PP* [1992] 2 MLJ 632, it was held by the Supreme Court that: 'The prosecution therefore has to establish beyond reasonable doubt that the appellant alone had possession of the drugs or that both he and his wife had joint possession of the drugs'. This depends on the particular facts of each case. In this case, Udin bin Tanda (SP6), the father of the appellant said the room was the room of the appellant, and although others come into that room, it was only to relax. He said in cross-examination that it was the appellants' room, the mattress is the appellant's mattress, the clothes in the room were the appellant's clothes, the things in the room were the appellant's things and that the appellant had no other premises, the room was specially for the appellant, and the appellant was always the occupier of the room.

SP4 Insp Kamaruzaman Sulaiman had read out the caution under s 37A of the Act and asked the appellant: 'Adakah kamu menyimpan apa-apa barang salah'. According to SP4, upon being asked that question, the appellant took him to his bedroom and showed him a mattress, a pillow on that mattress and pointed to underneath the pillow. Upon lifting the pillow SP4 found the orange plastic bag containing cannabis. According to SP4 the appellant looked pale. This, according to SP4 was witnessed by L/Kpl Ali Ahmed bin P Uboo and L/Kpl Sam Kok Wah.

In cross-examination SP4 maintained: 'Saya tidak setuju saya sendiri jumpa barang itu'. Thus while it was suggested that he found it himself, he had disagreed. It is trite that a question put in cross-examination lays out a line of defence but is not by itself evidence. Thus there being no evidence at this stage that what had happened is other than what SP4 said had happened. His evidence is essentially confirmed by the brother and the neighbour who gave evidence in the prosecution case. The evidence of SP4 ought therefore be accepted at its face value that he did ask that specific question, and as to the response by the actions of the appellant.

The question by SP4 was: 'Adakah kamu menyimpan apa-apa barang salah'. The question was whether he, the appellant kept any prohibited item. His action in response shows that he admitted to being the person keeping the 'barang salah'. He acknowledged that the thing in the orange bag was a 'barang salah'. He showed SP4 where it was. Therefore he knew what it was. In other words he had custody, control and knowledge of the cannabis in the orange bag. He therefore had the requisite guilty knowledge. This is clearly distinguishable from *PP v Khoo Boo Hock & Anor*. The accused was asked whether there were drugs on the premises. He proceeded to show where the drugs were in premises occupied by him and his wife. On

the facts of that case it was not possible to say whether they merely had knowledge of the presence of the offending exhibits under the floorboards of the storeroom, and so were merely assisting the police in their recovery by indicating someone else's guilt. The distinction is that in this case the appellant was asked the very specific question whether he kept any prohibited item, whereupon he proceeded to show SP4 where they were. It would be less clear if the question was whether there were any prohibited items on the premises, which question does not require that he had anything to do with the items.

In the context of the question the subsequent leading of SP4 to the offending drug cannot be said to be merely assisting in their recovery as in *PP v Khoo Boo Hock & Anor*; *Yee Ya Meng v PP* [1972] 1 MLJ 120. It is evident that the appellant's conduct of showing the offending material, in reply to the question: 'Adakah kamu menyimpan apa-apa barang salah' shows that the appellant is keeping something that he knows is wrong in law, and that prohibited item was shown to be cannabis. Such evidence falls squarely within s 27 of the Evidence Act 1950 which provides:

> How much of information received from accused may be proved
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

At the relevant time the appellant was not strictly in police custody and there is no barrier to the admissibility of the evidence. However, even assuming that he was in custody of a police officer, s 27 allows the admission of such evidence.

Failure to call certain witnesses

L/Kpl Ali Ahmed bin P Uboo and L/Kpl Sam Kok Wah were present in bedroom with the appellant and SP4. But they were not called. It was submitted that an adverse inference ought to be drawn. From the record it is clear these witnesses were made available to the defence. There is therefore no element of withholding of evidence required before the adverse presumption may be drawn under s 114(g) of the Evidence Act 1950.

In *Abdullah Zawawi v PP* [1985] 2 MLJ 16 (SC) it was held by the Supreme Court that the prosecution is at liberty to decide for itself as to which and how many witnesses it wishes to call, but since the onus is always upon the prosecution to prove its case beyond reasonable doubt, the prosecution is obliged to call such witnesses as are essential to the narrative of its case. Calling such witnesses as are essential to the narrative of its case does not mean calling every relevant witness. All it means is that there should be at least one witness on every element of the prosecution case. The evidence of the main witness, SP4 was not shaken in cross-examination, and witnesses have testified and given evidence on each and every element of the charge. The need to call an additional witness, be it L/Kpl Ali Ahmed

bin P Uboo or L/Kpl Sam Kok Wah or both to support his testimony therefore did not arise.

The magistrate was therefore correct in holding that the prosecution had succeeded in proving a prima facie case against the appellant, and to call upon the appellant to enter on his defence.

The defence case

The appellant gave evidence. He said:

> Bila polis datang ke rumah, saya sedang menonton TV, SP4 masuk dalam bilik. Saya duduk di bilik tetamu. SP4 berpakaian pereman. Dia kata hendak periksa rumah dan saya kata jalankan.

It was not brought out in cross-examination of the brother and the neighbour who were watching television in the room during the prosecution case, if these effective words 'saya kata jalankan' were said in their presence and hearing. There was no evidence given directly to assert that SP4 found the cannabis himself, without the appellant pointing it to him. There is no affirmative evidence from the appellant to raise any reasonable doubt that he did not show SP4 where the cannabis was under the pillow on the mattress in the bedroom. I find that these general words in the evidence of the appellant is insufficient to raise a doubt against the specific evidence of SP4.

The following is part of the cross-examination of the appellant:

Q: Setuju pada 11.00 pm polis telah serbuan?

A: Ya.

Q: Setuju, polis buat pemeriksaan di ruang tamu, tidak jumpa apa?

A: Tidak tahu.

Q: Kemudian mereka soal siasat kamu?

A: Ya.

Q: Lepas soal siasat kamu bawa pasukan polis ke bilik tidur?

A: Tidak setuju.

Q: Cadangkan kepada kamu, kamu bawa polis ke bilik kamu?

A: Ya.

Q: Cadangkan dalam bilik tidur kamu telah tunjukkan satu tilam tanpa katil kepada polis?

A: Tidak setuju.

Q: Cadangkan tilam itu ada bantal di atas?

A: Banyak.

Q: Cadangkan, awak telah tunjukkan polis apa di bawah bantal?

A: Tidak tunjuk.

Q: Cadangkan Insp Kamaruzaman telah angkat bantal itu dan dapati bawah bantal itu satu plastik warna oren yang mengandungi ganja?

A: Setuju.

Q: Cadangkan, pada masa itu kamu dalam keadaan takut? A

A: Tidak setuju.

His evidence in chief suggests he took no interest in the search of the bedroom. In cross-examination, he denied that after being questioned he took SP4 to the bedroom. Then he contradicted himself. When it was put to him that he brought the police to his bedroom, he agreed. He agreed that B when SP4 lifted the pillow, the orange plastic bag containing cannabis was under the pillow, but denied that he pointed to the pillow. It suggests that SP4 found the drugs under the pillow on his own. SP4 had earlier disagreed that he found the drugs under the pillow on his own. The denial is consistent with his earlier evidence that after he asked the appellant 'adakah awak menyimpan apa-apa barang salah', the appellant had led him to the C bedroom, showed him a mattress without a bed and pointed to underneath a pillow, and when he lifted the pillow, the drugs in an orange plastic bag was found.

It was not put to SP4 there were many pillows on the mattress. His evidence that 'OKT dalam keadaan takut iaitu mukanya pucat' was not D challenged. It is unbelievable that SP4 could go into the bedroom and go straight to the mattress and lift the pillow on the mattress covering the bag directly, particularly in view of the fact that according to the appellant, there were many pillows. The appellant did not see it fit to explain matters more clearly in examination in chief or in re-examination. In this context the E appellant's denial in his testimony that he pointed out the bag under the pillow to the police is nothing more than a bare denial: *PP v Ling Tee Hud* [1982] 2 MLJ 324 at p 325. L/Kpl Ali Ahmad and L/Kpl Sam Koh Wah were not called by the defence to contradict the evidence of SP4.

Conclusion F

The grounds of appeal relate to findings of fact. It is within the power of an appellate court to review the facts of a case: *Mohd Shariff v PP* [1964] MLJ 64. In *PP v Ma'arif* [1969] 2 MLJ 65 at p 66 it was stated:

> The case evolved purely on a question of fact and, bearing in mind that 'An G appeal is merely a continuation of a trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the court are correct,' I found it necessary in this case to review the whole of the evidence adduced by the prosecution. It is true that a magistrate's decision should not be reversed on the ground of its being against the weight of evidence. However, there is no reason why it should not be done if it were H found that the decision was grossly against the weight of the evidence. It is perhaps appropriate to refer to a passage in *Mallal's Criminal Procedure* (4th Ed) at p 467, which states that:
>
> > 'There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter the appellate court will more readily form an I independent opinion than in the case of the former which involve the evaluation of the evidence of the witnesses, particularly where the finding could be founded on their credibility or bearing', ...

A and

> An appellate court may allow an appeal from a determination on a question of fact if it appears to the court that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.' (*Re AB Ltd*).

B Thus the general rule is that an appellate court will not interfere with findings of fact: see *Shamsuddin Mohd Tahir v PP* [1998] 3 CLJ Supp 170. In *Yusoff bin Kassim v PP* [1992] 2 MLJ 183 (SC) the Supreme Court held that upon an issue depending upon oral evidence where there is plainly perjury on one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has heard the witnesses, C except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. An appellate court can, in appropriate circumstances, act upon its own view of the conflicting evidence.

The learned judge accepted the evidence of SP6 that the sole occupier D of the room was the appellant and that the things in the room belonged to the appellant who had no other place to stay but stayed in that room when he was not working; that although others come to the room to rest they did not stay. In other words he was the only occupant of the room and therefore has custody and control or possession of the things in the room. I note this evidence was given when SP6 was recalled after his son, the appellant had E given evidence. This is testimony the learned judge heard for himself.

Even if the fact other persons had access to the room as visitors is accepted as precluding a finding he was in possession of the things including drugs in the room on the grounds of being the only occupant of the room, there are other evidence that independently linked him to the drugs found. F The learned trial judge accepted the evidence of SP4 that the appellant showed him where the package of drugs were in response to the specific question 'Adakah kamu menyimpan apa-apa barang salah'. No reasonable doubt was raised as to the prosecution evidence that a caution had been given to the appellant. There is no suggestion that the appellant cannot understand the very simple question. The question does not relate as to G whether he knew there were drugs kept in the room, which does not imply he is the owner or the possessor of the drugs, but whether 'kamu menyimpan' any such thing on the premises, whereupon he led SP4 and two other policemen to the room and pointed to underneath a pillow on his mattress. Upon lifting the pillow, SP4 found the drugs in an orange H coloured plastic bag. The direct facts are simple in nature and leads to the irresistible conclusion he had possession of the said drugs.

There is nothing in the testimony of SP4 and SP6 to show they could not be believed and accepted. The learned judge having had the benefit of hearing the appellant's testimony himself decided nevertheless to accept the testimony of SP4 and SP6, and after hearing the defence evidence and upon I an evaluation of all of the evidence adduced concluded that the prosecution had proved its case beyond reasonable doubt and accordingly convicted the appellant as charged.

The appellant in his tenth ground of appeal argues only that the finding of the judge was against the weight of evidence, clearly conceding that while he would argue that the decision was against the weight of evidence, he could not maintain it was grossly against the weight of evidence (see *PP v Ma'arif*). I quite agree it cannot be said the finding is grossly against the weight of the evidence before the learned judge in relation to the basic questions of fact and leading irresistibly to the conclusion in law that the prosecution had proved its case beyond reasonable doubt that the appellant had possession of the 107.3g of cannabis.

In view of the above it is not necessary to go into the application of any of the presumptions.

Accordingly I dismissed the appeal.

Appeal dismissed.

Reported by Jafisah Jaafar